UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/069
Judgment No.: UNDT/2011/158
Date: 7 September 2011
Original: English

**Before:** Judge Goolam Meeran

**Registry:** New York

**Registrar:** Santiago Villalpando

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

# JUDGMENT

# ON APPLICATION FOR SUSPENSION OF ACTION

**Counsel for Applicant:**
George Irving

**Counsel for Respondent:**
Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Notice: This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

**Introduction**

1. On 26 August 2011, at 1:38 p.m., the Applicant filed her application for suspension of action with the Registry of the Dispute Tribunal, New York. In this application, she requests the suspension of the decisions dated 26 and 27 July 2011 of the Chief of Human Resources ("HR"), United Nations Economic and Social Commission for Asia and the Pacific ("ESCAP"), Bangkok, and a Medical Officer, ESCAP, by which she alleged that they have compelled her to undergo "a medical evaluation as a result of/or based on undisclosed adverse comments".

2. In an email received by the Registry on the same date, Counsel for the Applicant requested that the Applicant's name be omitted from any published document.

3. On the same date, at 5:22 p.m., the Registry acknowledged receipt of the application and served it on the Respondent, providing him with a time limit until Tuesday, 30 August 2001, 5:00 p.m., to file and serve a reply.

4. At 5:27 p.m., Counsel for the Applicant filed and served a revised application. which in substance was not materially different to the initial application.

5. On 29 August 2011, Counsel for the Respondent filed and served a motion requesting an extension of time for filing the Respondent's reply until Thursday, 1 September 2011, at 5 p.m. In Order No. 208 (NY/2011) of 29 August 2011, the Tribunal granted the Respondent leave to file his reply by 3 pm on 1 September 2011.

6. On 1 September 2011, the Respondent filed a reply requesting that the application for suspension of action be dismissed on the grounds that:

a. the application does not concern an administrative decision within the meaning of Art 2.2 of the Statute of the Dispute Tribunal;

b. the two decisions have already been implemented and therefore cannot be suspended; and

c. the Applicant has not established that any of the three basic conditions for granting a suspension of action are present, namely *prima facie* unlawfulness, irreparable harm and urgency.

**Law**

7. Art. 2.2 of the Statute of the Dispute Tribunal makes provision for rules to be enacted giving the Tribunal power to suspend the implementation of an administrative decision where the decision appears to be *prima facie* unlawful, where the matter is particularly urgent and where the implementation of the decision would cause irreparable damage. Art. 13 of the Rules of Procedure of the Dispute Tribunal directly reflects this provision in the Statute.

8. Briefly, the essential components governing an application for suspension of action include the following:

a. There must be a decision articulated with clarity and precision in the application so that the Judge is clear about which decision is required to be suspended (see also the United Nations Appeals Tribunal's judgement in *Planas* 2010-UNAT-049);

b. There must be an ongoing management evaluation concerning the decision in question;

c. The application should contain a concise statement of the relevant facts which are intended to assist the Judge in determining whether the decision in question appears to be *prima facie* unlawful, whether there is particular urgency and whether its implementation would cause irreparable damage;

d. The Dispute Tribunal may, but is not obliged to, hear evidence and if it does so such evidence should be confined to the clarification of the issues relevant to an application under art 2.2 of the Statute;

e. The presentation of an application for a suspension of action is not a dress rehearsal for any subsequent application on the merits of the decision;

f. Given the urgent nature of such applications and the need for an expeditious consideration, it is unhelpful for parties to raise obtuse technical points or to otherwise create complications to what was intended to be a simple procedure to prevent what may appear to be an injustice and to give management an opportunity to review the decision before its implementation takes effect. In this respect, I concur with the comments of Her Honour Judge Memooda Ebrahim-Cartens in *Dougherty* UNDT/2011/133, para 26.

**The Applicant's factual allegations**

9. The Applicant's outline of facts include the following contentions, which are relevant to the present application:

a. Sometime between the period of 18 to 20 July the Applicant's supervisor complained to the Medical Officer that her behaviour was causing concern in the workplace;

b. On 27 July, following a consultation with the applicant, the Medical Officer informed her that she must undergo a medical evaluation and specified the name of the practitioner. The Applicant requested to be able to select her own practitioner or to select a practitioner from a few options provided by ESCAP. This request was denied. The Applicant was informed that she could not return to her office pending the completion of the review;

c. On 2 August, the Applicant met with the practitioner. He informed her that she had to undergo a four to six week medical evaluation.

**Consideration**

*Time limit for the Dispute Tribunal to consider the application*

10. Under art. 13.2 of the Rules of Procedure of the Dispute Tribunal, the Tribunal "shall consider an application for interim measures within five working days of the service of the application on the respondent". According to the Information Note to Parties Appearing before the United Nations Dispute Tribunal, the Registry closes for filing purpose, at 5 p.m. Since the application was only served on the Respondent after this hour, namely at 5:22 p.m. (on Friday, 26 August 2011), the application is not considered as served on the Respondent before Monday, 29 August 2011. The time limit for the Tribunal to consider the case is therefore 10 September 2011, taking into account that 31 August and 5 September 2011 were official holidays at the United Nations Secretariat, New York.

*Does the decision appear to be* prima facie *unlawful?*

11. The Applicant has to satisfy the test that the decision appears *prima facie* to be unlawful. In other words, does it appear to the Tribunal that, unless it is satisfactorily rebutted by evidence, the claim of unlawfulness will succeed? At this stage, the Applicant's allegations are assertions that are not adequately supported by evidence. However, it would appear that the Medical Officer involved acted appropriately in arriving at a professional assessment prescribing further medical evaluation. All other decisions which predate this have already been implemented and there is nothing for the Tribunal to order suspension of. Whether the actions of the Chief of HR were made fairly and within his discretion can only be tested at a hearing on the merits and I make no comment on them save to point out that any such discretion is not unfettered. The only matter that is appropriately before the Tribunal is the decision of the Medical Officer who prescribed further medical evaluation. Whether this is an administrative act or not is for further argument and submission at any hearing of the merits of a substantive claim. Currently there is nothing in the material before the Tribunal that could even remotely satisfy the test of *prima facie*

unlawfulness in relation to the only matter that falls to be considered, i.e., whether the Tribunal should order a suspension of the medical evaluation process.

12. Given the conclusion of the Tribunal that the decision of the Medical Officer does not appear to be unlawful and since the test to be satisfied is cumulative in that all three elements have to be present pursuant to art. 2.2 of the Statute of the Dispute Tribunal, it is not necessary to consider whether the matter is of particular urgency or whether the implementation of the decision would cause irreparable damage.

**Conclusion**

13. The application for a suspension of action is refused. The Applicant may wish to consider that it is in her best interest to have regard to medical opinion and advice.

(*Signed*)

Judge Goolam Meeran

Dated this 7th day of September 2011

Entered in the Register on this 7th day of September 2011

(*Signed*)

Santiago Villalpando, Registrar, New York